RECENT DECISIONS.

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BANKRUPTCY—ALIMONY—FOREIGN JUDGMENT.—The plaintiff was granted alimony in gross in South Dakota against the defendant's testator and secured a judgment in New York for its recovery. Subsequently the testator was discharged in bankruptcy. *Held,* the New York judgment was not discharged by the bankruptcy proceedings. *Matter of Williams* (N. Y. Ct. of Appeals 1913) 49 N. Y. L. J. No. 8.

When a judgment has been rendered, the court, whenever necessary, will look beneath the formal proceedings in order to determine the nature of the liability which has been reduced to judgment, and will give the decree the characteristics of the liability. *Boynton* v. *Ball* (1887) 121 U. S. 457. Accordingly, since alimony is not a debt discharged by bankruptcy but an allowance for support arising out of the marital status, 12 COLUMBIA LAW REVIEW 638; *Romaine* v. *Chauncy* (1892) 129 N. Y. 566, a judgment for alimony retains this quality and is itself not a debt provable in bankruptcy. *Audubon* v. *Shufeldt* (1901) 181 U. S. 575. It would also seem that a judgment upon a foreign judgment for alimony is subject to the same scrutiny and that it is of a nature identical with that of the original decree, and therefore not discharged in bankruptcy. See *Wetmore* v. *Markoe* (1904) 196 U. S. 68. A contrary holding would lead to absurd results. By the weight of authority there is no merger of a foreign judgment upon a recovery on it in another State. 13 COLUMBIA LAW REVIEW 69. Accordingly, even if the New York judgment were considered a debt discharged by bankruptcy, the foreign judgment would still exist, and might after the discharge be made the basis of another suit. The result reached in the principal case, therefore, seems clearly sound and is now within the express provisions of §17 of the Bankruptcy Act as amended in 1903, which are, however, merely declaratory of the previously existing law. See *Wetmore* v. *Markoe supra.*

CONFLICT OF LAWS—COMITY IN INTERPRETATION OF LAW MERCHANT.—A promissory note made and indorsed in Oklahoma was non-negotiable by the decisions of that State, but negotiable according to the decisions in Texas, where the suit was brought. *Held,* the holder could recover, since the Oklahoma decisions were not conclusive as to the *lex loci contractus* in questions involving general commercial law. *Hardy* v. *Lamb* (Tex. 1913) 152 S. W. 650.

The Federal courts, while maintaining that they are administering the law of the State applicable to the particular controversy, have consistently refused to be bound by the interpretation of that law by the State courts, where the question does not involve rights of property or the construction of State constitutions or statutes. *Swift* v. *Tyson* (1842) 16 Pet. 1; see *Burgess* v. *Seligman* (1882) 107 U. S. 20; *Smith* v. *Alabama* (1887) 124 U. S. 465. This policy is based on the theory that judicial decisions are not the law but merely evidence of it, see *Ray* v. *Natural Gas Co.* (1891) 138 Pa. St. 576, 590, and that the Federal judges need not follow the errors of State courts on questions

which they have an equal opportunity to determine for themselves. *Swift* v. *Tyson supra;* see *Meade* v. *Beale* (1850) Taney 339, 360. But in each case it is the law of the State which they purport to administer. *Bucher* v. *Ry. Co.* (1887) 125 U. S. 555, 582; *Transportation Co.* v. *Parkersburg* (1882) 107 U. S. 691, 700; *Swift v. Ry. Co.* (1894) 64 Fed. 59. On the question of whether State courts are equally free to apply their own concept of the general law of another State, there is an absolute conflict of authority. New York and Iowa have emphatically declared that it shall be deemed the *lex loci,* the decisions of the foreign State to the contrary notwithstanding. *Faulkner* v. *Hart* (1880) 82 N. Y. 413; *Franklin* v. *Twogood* (1868) 25 Ia. 520. In the majority of States, however, principles of comity, and the desire for certainty of legal obligations have led to the unquestioned acceptance of the decisions of courts of other States as indicating their local law. *Roe* v. *Jerome* (1846) 18 Conn. 138, 159; *Limerick Nat. Bank.* v. *Howard* (1901) 71 N. H. 13; *Harrison* v. *Edwards* (1840) 12 Vt. 648.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—AMENDMENT OF USURY STATUTES.—Under the statute in force at the time of a usurious loan secured by a mortgage, the lender could recover only the principal; but the rule of equity at the same time required the debtor to tender principal and lawful interest in order to redeem. A retrospective statute was passed making the rule in equity uniform with that at law. *Held,* the statute was constitutional. *Reynolds* v. *Lee* (Ala. 1912) 60 So. 101.

It is within the power of a legislature to make changes in the adjective law affecting an existing contract; *Tennessee* v. *Sneed* (1877) 96 U. S. 69; see *Morley* v. *Lake Shore R. R. Co.* (1892) 146 U. S. 162; but as its obligation consists of its enforcibility according to the law under which it was made, any legislation which alters the substantive rights flowing from it, though masked as a mere change of remedy, is unconstitutional. *Barnitz* v. *Beverly* (1896) 163 U. S. 118; *Van Hoffman* v. *City of Quincy* (1866) 4 Wall. 535. Inasmuch as in the principal case equity had given the lender a substantive right to receive legal interest before surrendering his security, see *Lindsay* v. *U. S. Savings & Loan Co.* (1899) 127 Ala. 366, it seems difficult logically to deny to that right the protection of the Constitution. But the courts are apparently reluctant in this class of cases to indulge in nice reasoning for the protection of a usurious lender. It would seem to be their tendency to declare that the contract of the parties is fixed by the statute, and that the necessity of tender is no part of that contract, but merely the result of a rule of equity procedure. According to this view, amendments like that in the principal case amount merely to the imposition of an additional penalty for a contract which, when made, was against the policy of the laws. See *Hardin* v. *Trimmier* (1887) 27 S. C. 110; *Mackay* v. *Holmes* (1892) 52 Fed. 722.

CONSTITUTIONAL LAW—LOCAL REFERENDUM—ERECTION OF NEW COUNTY.—A New York statute providing for the erection of a new county in the Bronx was conditioned to be inoperative if it failed to receive the votes of a majority of electors of the proposed county. *Held,* the statute was constitutional. *People ex rel. Unger* v. *Kennedy* (N. Y. Ct. of Appeals 1913) 48 N. Y. L. J. No. 145.

The popular referendum of questions of local interest is defended upon the theory that while the legislature cannot delegate to the people

the power to say whether an act shall become law, *Barto* v. *Himrod* (1853) 8 N. Y. 483, it may make the operation of a statute of local concern contingent upon the approval of the voters affected. *State* v. *O'Neill* (1869) 24 Wis. 149; *Locke's Appeal* (1873) 72 Pa. St. 491; *Bank* v. *Village of Rome* (1858) 18 N. Y. 38. Though the validity of contingent legislation is well recognized even where the contingency is a fact the existence of which is to be determined by the judgment of an individual, *Field* v. *Clark* (1892) 143 U. S. 649; *State* v. *Thompson* (1901) 160 Mo. 333, yet if popular approval be made the condition it is hard to see that it is not, in effect, the people who are legislating. See *Rice* v. *Foster* (Del. 1847) 4 Harr. 479; *Parker* v. *Commonwealth* (Pa. 1847) 6 Barr 507. General laws framed on this plan are ordinarily rejected; *Opinions of the Justices* (1894) 160 Mass. 586; and since the argument applies equally to general and local legislation it might be inferred that an arbitrary exception has been made in favor of the latter. See Oberholtzer, Referendum in America, ch. 13. A more satisfactory justification is that the delegation of legislative power in the State constitutions, since it is founded upon the theory that the representatives can best judge of the expediency of laws, does not necessarily include all legislation whose application is limited territorially. See 7 COLUMBIA LAW REVIEW 61. Although the reference must be to the voters affected, it seems to be for the legislature to determine who those interested are, see *People* v. *Nally* (1875) 49 Cal. 478, and therefore the fact that all the electors in New York County did not have an opportunity to vote on the question did not invalidate the law. *People* v. *McFadden* (1889) 81 Cal. 489; see *People* v. *Reynolds* (1848) 10 Ill. 1.

CONSTITUTIONAL LAW—SHERMAN ACT—VALIDITY AS CRIMINAL STATUTE. —The defendant, prosecuted under the Sherman Anti-Trust Act, pleaded that the law was void for uncertainty. *Held,* the plea was bad. *United States* v. *Patterson* (D. C., S. D. Ohio, W. D. 1912) 201 Fed. 697. See Notes, p. 421.

CONTRACTS—RESTRAINT OF TRADE—CONTROL OF PRODUCT MANUFACTURED BY SECRET PROCESS.—The plaintiff company, manufacturing a particular brand of ground chocolate by a secret process, sold to jobbers only upon their undertaking to sell to retailers at fixed prices. The jobbers, in turn, for the manufacturer's benefit required a similar undertaking by retailers, to enjoin a breach of which the plaintiff sued. *Held,* the contract was not in restraint of trade, and the injunction should be granted. *D. Ghirardelli Co.* v. *Hunsicker et al.* (Cal. 1912) 128 Pac. 1041.

The discoverer of a secret process, though he may effectively contract to restrict or monopolize the use of the process, is, in regard to marketing the manufactured product, subject to the usual rules regarding contracts in restraint of trade. *Park & Sons Co.* v. *Hartman* (1907) 153 Fed. 24; *Dr. Miles Med. Co.* v. *Park & Sons Co.* (1911) 220 U. S. 373. Such a manufacturer, therefore, if he has a practical monopoly in a commodity, may not produce a stringency in the sale by maintaining a uniform price through a series of contracts such as that in the principal case. *Park & Sons Co.* v. *Hartman supra; Dr. Miles Med. Co.* v. *Park & Sons Co. supra; contra, Garst* v. *Harris* (1900) 177 Mass. 72; *Elliman* v. *Carrington, L. R.* [1901] 2 Ch. 275.

On the other hand, the producer of only a portion of the general supply, under a special trade name, may make such agreements, since the presence of other brands of the same commodity insures competition in that field. *Grogan* v. *Chaffee* (1909) 156 Cal. 611; *Walsh* v. *Dwight* (N. Y. 1899) 40 App. Div. 513. The test, it seems, is whether the subject matter of the monopoly is to be regarded as a distinct commodity or as simply one of several brands of the same commodity. See *Cummings* v. *Union Blue Stone Co.* (1900) 164 N. Y. 401. The enforcement of such agreements, of course, is subject to the contract law of the jurisdiction. In California the statutory provision in favor of suits by beneficiaries entitles the manufacturer to sue the retailer; but even where a beneficiary has no rights, the same result, it seems, might be reached upon the theory that the jobber in contracting with the retailer acts as the manufacturer's agent.

CONVERSION—WRONGFUL BAILMENT—PLEDGEE'S LIABILITY TO TRUE OWNER.—The defendants, in ignorance of the plaintiff's title, received certain of her stocks in an unauthorized pledge. At the request of the pledgor they delivered them to other parties who they knew were also pledgees and from whom they received payment of their liens. *Held,* they were guilty of conversion, having participated with the pledgor in the transfer. *Varney* v. *Curtis* (Mass. 1913) 100 N. E. 650.

Not every intermeddling with the chattels of another will constitute such an assumption of dominion as to amount to a conversion, see *Hollins* v. *Fowler* (1875) L. R. 7 H. L. 757; affirming L. R. 7 Q. B. 616, for the defendant may have injured or carried off the goods under circumstances indicating that he was not denying the owner's title, *Simmons* v. *Lillystone* (1853) 8 Ex. 431 and note; *Fouldes* v. *Willoughby* (1841) 8 M. & W. 540; Burdick, Law of Torts, (2nd ed.) 349, or he may have had reasonable justification for an unauthorized detention. *Alexander* v. *Southey* (1821) 5 B. & Ald. 247; *Wellington* v. *Wentworth* (Mass. 1844) 8 Met. 548. Thus it has been generally recognized that a bailee is not liable for receiving goods from a wrongful bailor, *Spackman* v. *Foster* (1883) L. R. 11 Q. B. D. 99; *cf.* *M'Combie* v. *Davies* (1805) 6 East 538, or for returning them in ignorance of the owner's title, *Steele* v. *Marsicano* (1894) 102 Cal. 666; *Leonard* v. *Tidd* (Mass. 1841) 3 Met. 6, and the same protection is accorded a delivery to a third person upon the bailor's order. *Parker* v. *Lombard* (1868) 100 Mass. 405; *Bank* v. *Rymill* (1881) 44 L. T. [N. S.] 767; but see *Hudmon* v. *DuBose* (1888) 85 Ala. 446. Where, however, the bailee takes upon himself the disposal of the property in other ways, *Hiort* v. *Bott* (1874) L. R. 9 Ex. 86, as where he asserts a property interest of his own in the chattel and thus participates in the wrongful transfer, as in the principal case, he is guilty of a conversion. *Consolidated Co.* v. *Curtis & Son,* L. R. [1892] 1 Q. B. 495; *Dolliff* v. *Robbins* (1901) 83 Minn. 498; but see *Leuthold* v. *Fairchild* (1886) 35 Minn. 99.

CORPORATIONS—CHARITABLE CORPORATIONS—POWER OF PRESIDENT TO ISSUE NEGOTIABLE PAPER.—The president of a charitable corporation, for his own benefit and without the required assent of the board of trustees, issued the corporation's notes which were transferred to the plaintiff, an innocent purchaser for value. *Held,* one judge dissenting, the corporation was not liable. *St. Vincent College* v. *Hallett* (C. C. A., 7th Circ., 1912) 201 Fed. 471.

The prevailing modern presumption that a president of a trading corporation has power to bind it by the execution of notes in the usual course of its trade, 12 COLUMBIA LAW REVIEW 274, is in some States regarded as conclusive in favor of a holder in due course, *McDonald* v. *Chisholm* (1890) 131 Ill. 273; *Murchison Nat. Bank* v. *Dunn Oil Mills Co.* (N. C. 1911) 73 S. E. 93; *contra, City El. St. Ry. Co.* v. *National Bank* (1896) 62 Ark. 33, and is based on the fact that the business of a corporation is customarily transacted by the president. 2 Thompson, Corporations, (2nd ed.) §§1452, 1473; *Sparks* v. *Dispatch Trans. Co.* (1891) 104 Mo. 531; *cf. Gould* v. *Gould* (1903) 134 Mich. 515. Accordingly, since the general customs of business do not ascribe to the president of a corporation not organized for profit the power to issue negotiable paper, a transferee of such paper should ordinarily be bound at his peril to ascertain whether the president was duly authorized to issue it. *Cattron* v. *Universalist Society* (1877) 46 Ia. 106; *People's Bank* v. *Church* (1888) 109 N. Y. 512; *People's National Bank* v. *New England Home* (1911) 209 Mass. 48. In the principal case, however, a statute empowered the charitable corporation to issue notes, and the by-laws designated the president as the proper party to sign them. It would seem, therefore, that the distinction in favor of the charitable corporation should not have been invoked against a holder in due course in applying the Illinois rule of *McDonald* v. *Chisholm supra.*

CORPORATIONS—DIRECTORS—ENGAGING IN COMPETING BUSINESS.—Some of the directors and officers of a bankrupt gas-producing company, acting on their own behalf, purchased and resold a franchise to sell gas. A stockholder, having failed to induce the corporation to act, brought suit for an accounting to the company for the profits from this transaction. *Held,* the defendants were not bound to account. *Jasper* v. *Appalachian Gas Co.* (Ky. 1913) 153 S. W. 50. See notes, p. 431.

CORPORATIONS—SERVICE ON AGENT OF FOREIGN CORPORATION—REVOCATION OF AGENCY.—The plaintiff sued a foreign corporation, serving process on the designated agent. The defendant pleaded that inasmuch as it had withdrawn from the State and revoked the agency the service was invalid. *Held,* two judges dissenting, the plea was bad. *Brown-Ketcham Iron Works* v. *George B. Swift Co.* (Ind. 1913) 100 N. E. 584.

In applying the State statutes for service of process upon agents designated by foreign corporations as a condition of engaging in business, the courts have shown a disposition to make the amenability to service commensurate with the obligations incurred by the corporation within the State. Thus, when a corporation has ceased to accept new business but continues to derive benefits from its former contracts there has been no difficulty in holding that the agency subsists for the purpose of receiving service, on the ground that the corporation is still engaged in business in the State. *Mutual Life Ins. Co.* v. *Spratley* (1899) 172 U. S. 602. Again, a statutory provision expressly stipulating that service may be made upon the agent after the company's withdrawal from the State is effective. *Woodward* v. *Mutual Reserve Life Ins. Co.* (1904) 178 N. Y. 485. The principal case implies such a condition where none is expressly exacted in the statute. Since a judgment founded upon such service does not deprive the corpora-

tion of its property without due process of law, *Groel* v. *United Electric Co.* (1905) 69 N. J. Eq. 397, the question is properly one of interpretation of the legislative intention. The result reached, moreover, though opposed to the earlier decisions, *Swann* v. *Mutual Reserve Ass'n* (1900) 100 Fed. 922; *Friedman* v. *Empire Life Ins. Co.* (1899) 101 Fed. 535; *Cady* v. *Associated Colonies* (1902) 119 Fed. 420, represents the prevailing view that the statute must have been intended to fully protect those who deal with the corporation during its activity within the State. *Mutual Reserve Ass'n* v. *Phelps* (1903) 190 U. S. 147; *Groel* v. *United Electric Co. supra.*

CRIMINAL LAW—CUMULATIVE PUNISHMENT—EFFECT OF PARDON OF FIRST OFFENSE.—The defendant was convicted of counterfeiting, was pardoned, and then committed forgery. *Held,* punishment beyond that ordinarily inflicted for such a crime could be imposed under a statute providing for additional punishment for second offenses. *People* v. *Carlesi* (N. Y. App. Div. 1913) 139 N. Y. Supp. 309. See Notes, p. 418.

EVIDENCE—IMPEACHMENT OF TESTIMONY—ADMISSION BY DEFAULT.—In an action for libel, the plaintiff's testimony was sought to be impeached by his statement on cross-examination that he "didn't fight" a former divorce suit, and by the production of the divorce petition charging him with gross cruelty. *Held,* the petition was admissible in evidence. *Miller* v. *Journal Co.* (Mo. 1912) 152 S. W. 40.

The consideration of unfair surprise, which, together with that of confusion of issues, limits the impeachment of testimony by proof of the witness's misconduct to his own cross-examination, see 2 Wigmore, Evidence, §§979-981, also forbids impeachment by the introduction of a prior contradictory statement of the witness unless he has received a preliminary warning. *The Queen's Case* (1820) 2 Brod. & Bing. 284, 313; *Gotloff* v. *Henry* (1853) 14 Ill. 384. But this consideration does not apply when the witness is also a party, and in such case his prior admission may be received at any time. *Rose* v. *Otis* (1892) 18 Colo. 59; *Churchill* v. *White* (1899) 58 Neb. 22. Such admissions may, of course, be found in pleadings of the witness as a party in another suit, *St. Paul Ins. Co.* v. *Brunswick Co.* (1901) 113 Ga. 786; *Boots* v. *Canine* (1883) 94 Ind. 408, and in at least two jurisdictions a judgment by default against the witness is received as an admission of the charges contained in his adversary's pleading. *Cragin* v. *Carleton* (1842) 21 Me. 492; *Millard* v. *Adams* (N. Y. 1892) 1 Misc. 431. The result reached in the principal case is, to be sure, a logical extension of the latter rule. But it seems at least doubtful if the rule of admission by default, which results from a strict application of the maxim *qui tacet consentire videtur,* should be favored, since it is generally held that assent is implied only when a reply is natural, *Drury* v. *Hervey* (1879) 126 Mass. 519; *Vail* v. *Strong* (1838) 10 Vt. 457, or more reasonably probable than silence. Bowen, L. J., in *Wiedemann* v. *Walpole,* L. R. [1891] 2 Q. B. D. 534.

EVIDENCE—OPINION OF NON-EXPERT.—In an action for breach of promise of marriage a witness was asked whether, from his observation of the plaintiff's conduct, she was, in his opinion, "attached to the defendant." *Held,* the question was objectionable as calling for inadmissible evidence. *Pearce* v. *State* (N. Y. Ct. of Appeals 1913) 48 N. Y. L. J. No. 143. See Notes, p. 429.

LIMITATION OF ACTIONS—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.—The plaintiff and seven others brought statutory ejectment, claiming title as heirs. After the period of limitation had expired, the complaint was amended to allege that the plaintiff was sole owner of the land in question under the will of the deceased. *Held,* the plaintiff could recover an undivided eighth of the land. *Cottonwood Lumber Co.* v. *Walker* (Ark. 1912) 152 S. W. 1005.

Whether, in the principal case, the Statute of Limitations is a defense to the amended complaint depends upon the solution of two questions: first, whether the change from heir to devisee, and second, whether the change from sole owner to co-parcener, constitutes a new cause of action. Inasmuch as it is unnecessary in ejectment to allege the manner of acquiring the fee simple title, *Atwater* v. *Spalding* (1902) 86 Minn. 101; *Anderson* v. *Proctor Coal Co.* (Ky. 1903) 74 S. W. 717, it seems that the plaintiff's chain of title is not his cause of action but merely evidence of it, and that therefore the change from heir to devisee will not bar him. *McCandless* v. *Inland Acid Co.* (1902) 115 Ga. 968; see *Gannon* v. *Moore* (1907) 83 Ark. 196, 200. Again, since in most jurisdictions one co-tenant has absolute title as against everyone but the other co-tenants and may recover the entire land from a disseisor, *Erhardt* v. *Boaro* (1884) 113 U. S. 527, 537; *Dorlan* v. *Westervitch* (1903) 140 Ala. 283; *contra, Williams* v. *Mining & Mfg. Co.* (1905) 115 Tenn. 578, it would apparently follow that the change from co-parcener to sole owner did not amount to a change in the cause of action. See *Roberson* v. *McIlhenny* (1883) 59 Tex. 615; *cf. Becnel* v. *Waguespack* (1888) 40 La. Ann. 109; *Vunk* v. *Raritan River Ry. Co.* (1894) 56 N. J. L. 395; but see *White* v. *Moss* (1893) 92 Ga. 244. At all events it seems clear that if the change be considered sufficient to bar any part of the claim it should bar the entire claim; *White* v. *Moss supra;* and there appears to be no authority for the result reached in the principal case.

LIMITATION OF ACTIONS—CONTRACT TO DEVISE—ANTICIPATORY BREACH.—The decedent promised to devise his property to the plaintiff as consideration for services to be rendered by the latter during his life. The plaintiff was prevented from performing by the actions of the decedent. *Held,* the Statute of Limitations ran from the date of the anticipatory breach. *Paul* v. *Snyder* (Ind. 1912) 100 N. E. 571.

Where services are to be rendered during the life of the decedent in consideration that a definite compensation shall be devised to the person rendering them, a right of action on the contract does not accrue until the death of the promisor, *Goodloe* v. *Goodloe* (1905) 116 Tenn. 252; *Patterson* v. *Patterson* (N. Y. 1816) 13 Johns. 379, since there can be no actionable breach until the time agreed upon for the performance has arrived and no devise is made. This is also true where the contract is one to bequeath a fair compensation for services rendered, *In re Hess' Estate* (1894) 57 Minn. 282; *Stone* v. *Todd* (1887) 49 N. J. L. 274, and applies as well whether the promisee has completely performed, *In re Hess' Estate supra,* or only partially performed, when the action is for breach of the contract to devise. *Avery* v. *Moore* (1889) 34 Ill. App. 115; *contra, Bonesteel* v. *Van Etten* (N. Y. 1880) 20 Hun 468. If, however, the action is upon a *quantum meruit* for the reasonable value of the services actually rendered, the cause of action arises at the time of the anticipatory breach and the Statute begins to run immediately. See *Banks* v. *Howard* (1902) 117 Ga. 94; *Ga Nun*

v. *Palmer* (1911) 202 N. Y. 483. In the principal case, therefore, the cause of action on the contract would have accrued on the death of the promisor, but it seems that the plaintiff is suing on a *quantum meruit* for the reasonable value of the services rendered up to the time of the anticipatory breach; in such a case the Statute clearly runs from that date, as the court held.

MASTER AND SERVANT—UNLAWFUL EMPLOYMENT OF CHILD—EFFECT OF MISREPRESENTATION AS TO AGE.—The plaintiff, by making false representations as to his age, obtained employment with the defendant. He was later injured, and sued under a statute forbidding the employment in mines of children under the age of fourteen years. *Held,* two judges dissenting, the plaintiff was not estopped to recover. *DeSoto Coal, Mining & Development Co.* v. *Hill* (Ala. 1912) 60 So. 583.

While it has frequently been held that a defendant in a contract action is not estopped to set up a plea of infancy by his misrepresentations as to his age, *Merriam* v. *Cunningham* (1853) 65 Mass. 40; *Sims* v. *Everhardt* (1880) 102 U. S. 300; but see *Commander* v. *Brazil* (1906) 88 Miss. 668, the courts have rarely found occasion to apply the doctrine of estoppel to the situation presented in the principal case. But the result reached seems in accord with the prevailing tendency to give full effect to the protective purpose of the Child Labor Acts. This is indicated by the cases which hold that it is negligence *per se* to employ an infant who is under the statutory age limit, *Inland Steel Co* v. *Yedinak* (1909) 172 Ind. 423; *Leathers* v. *Tobacco Co.* (1907) 144 N. C. 330, and that the defenses of contributory negligence and assumption of risk are not open to the master. *American Car Co.* v. *Armentraut* (1905) 214 Ill. 509; *Glucina* v. *Goss Brick Co.* (1911) 63 Wash. 401; see 11 COLUMBIA LAW REVIEW 382; *contra, Darsam* v. *Kohlmann* (1909) 123 La. 164. In a jurisdiction in which the master is bound to use only reasonable diligence in ascertaining the age of the infant, *Koester* v. *Rochester Candy Works* (1909) 194 N. Y. 92, the latter's misrepresentation may often relieve the master of liability. In the majority of jurisdictions which have passed upon the question, however, the master is bound at his peril to discover the age of the infant; *Kirkham* v. *Wheeler-Osgood Co.* (1905) 39 Wash. 415; *Syneszewski* v. *Schmidt* (1908) 153 Mich. 438; *American Car Co.* v. *Armentraut supra;* and such a construction seems consonant with sound public policy.

MORTGAGES—CONVEYANCE BY MORTGAGEE TO INNOCENT PURCHASER—MEASURE OF DAMAGES.—The defendant, a grantee who took by a deed which, though absolute in form, was intended as a mortgage, conveyed to an innocent purchaser, thus depriving himself of the power to reconvey to the mortgagor. Subsequently the mortgagor, tendering payment, sought to redeem. *Held,* he could recover the value of the land at the time of tender. *Clark* v. *Morris* (Kan. 1913) 129 Pac. 1195.

The measure of damage which the mortgagor may recover when the mortgagee, by transferring the property to an innocent purchaser, has cut off the equity of redemption, is often said to depend upon the *bona fides* of the mortgagee in making the transfer. Under this theory some courts restrict the mortgagor's recovery to the proceeds received by the mortgagee from the sale, if there is no evidence of intent to defraud. *Gibbs* v. *Meserve* (1883) 12 Ill. App. 613; *Wilson* v. *Drumrite* (1857) 24 Mo. 304. By the great weight of authority, however, no such distinction is taken, and the mortgagee is held to the liability of a trustee

with respect to the property, so that the mortgagor may, at his election, recover the value of the land at the time he tendered the mortgage money and asked to redeem, *Boothe* v. *Fiest* (1891) 80 Tex. 141; *cf. Hart* v. *Ten Eyck* (N. Y. 1816) 2 Johns. Ch. 62, 117, or the proceeds realized by the mortgagee from the sale, *Shillaber* v. *Robinson* (1877) 97 U. S. 68; *Meehan* v. *Forrester* (1873) 52 N. Y. 277; *Sheldon* v. *Bradley* (1870) 37 Conn. 324; *Crassen* v. *Swoveland* (1864) 22 Ind. 427, or the value of the land at the time of the sale, irrespective of the amount actually received. *Enos* v. *Sutherland* (1863) 11 Mich. 538. This view seems sound, for there appears to be no occasion for inquiry into the mortgagee's intentions, since any transfer of the land by him which cuts off the mortgagor's right of redemption is a plain breach of his duty to hold as security.

MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS—CHARGE ON SPECIFIC FUND.—A city already indebted to the constitutional limit issued bonds for the construction of water works, payable only out of the income derived from such property. *Held,* the bonds were invalid. *Feil* v. *City of Coeur d'Alene* (Idaho 1913) 129 Pac. 643.

Constitutional limitations are frequently construed very liberally, in the interest of municipal development. *City of Valparaiso* v. *Gardner* (1884) 97 Ind. 1; *Swanson* v. *Ottumwa* (1902) 118 Ia. 161; *Winston* v. *Spokane* (1895) 12 Wash. 524. Certainly it seems that where a city acquires a profitable business to be paid for solely from the income thereof, no debt is created. *State* v. *City of Neosho* (1907) 203 Mo. 40; *Faulkner* v. *Seattle* (1898) 19 Wash. 320. Technically, it is a trust to receive and pay over water rents, *Brockenborough* v. *Commissioners* (1903) 134 N. C. 1; *Winston* v. *Spokane supra; State* v. *City of Neosho supra,* and would seem analogous to the municipal obligation created by street assessments, see *Swanson* v. *Ottumwa supra,* which are never considered municipal debts. On the other hand, a strict construction of such provisions has, in many instances, been invoked, placing every obligation, *Litchfield* v. *Ballou* (1885) 114 U. S. 190; *Keller* v. *Scranton* (1901) 200 Pa. St. 130, within the purview of the prohibition, *Prince* v. *City of Quincy* (1889) 128 Ill. 443; *City of Ottumwa* v. *City Water Supply Co.* (1902) 119 Fed. 315; *Beard* v. *City of Hopkinsville* (1894) 95 Ky. 239, thus checking municipalities in their improvident tendency to shift the weight of burdensome taxation on posterity. *Brix* v. *Clatsop County* (1905) 46 Ore. 223; see note to *City of Ottumwa* v. *City Water Supply Co.* 59 L. R. A. 604. The principal case, which is rather an extreme application even of this stricter view, but see *Beard* v. *City of Hopkinsville supra,* derives support from the peculiar language of the State constitution. Idaho Constitution, Art. 8, §3.

NEGLIGENCE—ASSUMPTION OF RISK—INVOLUNTARY SERVITUDE.—The plaintiff's intestate, a convict leased by the State to the defendant, was killed by the caving in of the defendant's mine, caused by a fellow-convict's negligence. *Held,* the defendant was liable. *Sloss-Sheffield Steel & Iron Co.* v. *Weir* (Ala. 1913) 60 So. 851.

A servant's assumption of the risks due to the negligence of his co-workers may arise either from an implied term of the contract of employment, or from his continuing to work after having discovered their incompetence. *Drake* v. *Auburn City Ry.* (1903) 173 N. Y.

466; *Hatt* v. *Nay* (1887) 144 Mass. 186; *U. S. Rolling Stock Co.* v. *Wilder* (1886) 116 Ill. 100, 110. It is obvious, however, that neither of these defenses may be pleaded against a convict, the involuntary nature of whose service precludes the implication of a contract, *Simons* v. *Ga. Iron & Coal Co.* (1904) 133 Fed. 776; *cf. Tozeland* v. *West Ham Union, L. R.* [1906] 1 K. B. 538, and prevents his quitting work because of the negligence of his fellows. *Sloss-Sheffield Co.* v. *Long* (1910) 169 Ala. 337. He may, however, be guilty of contributory negligence, *Hartwig* v. *Bay State Shoe Co.* (1889) 118 N. Y. 664, reversing 43 Hun. 425, but as the presumption is that his actions were dominated by an overseer, see *Chattahoochee Brick Co.* v. *Braswell* (1893) 92 Ga. 631; *Baltimore Boot Co.* v. *Jamar* (1901) 93 Md. 404, the plea should allege, as the principal case held, that he "voluntarily" incurred the danger. It is true, as has been urged, that the absence of a contract of employment between the State's lessee and a convict prevents the complete relation of master and servant, see *Buckalew* v. *Tennessee Coal Co.* (1895) 112 Ala. 146, 156; but see *Ward* v. *Young* (1884) 42 Ark. 542, but it does not preclude the application of the *respondeat superior* doctrine, for this depends not upon contract but upon the employer's power of control. *Cunningham* v. *Moore* (1881) 55 Tex. 373. In those States, therefore, which have by their prison regulations reserved complete control over convicts, the lessee is not held responsible; *Mason* v. *Hamby* (1909) 6 Ga. App. 131; *St. Louis Iron Mt. Ry.* v. *Boyle* (1907) 83 Ark. 302; but where, as seems to be the case in Alabama, convicts are subject to the orders of the lessee, his liability is that of a master for the acts of his servants. *Baltimore Boot Co.* v. *Jamar supra.*

NEGOTIABLE INSTRUMENTS—NON-PAYMENT OF INTEREST AS DISHONOR.—The plaintiff sued on a promissory note, on which at the time of his purchase an instalment of interest had not been paid. *Held,* he was, nevertheless, a holder in due course. *McPherrin* v. *Tittle* (Okla. 1913) 129 Pac. 721.

In determining whether the non-payment of interest is equivalent to dishonor, the real consideration is not whether interest is a part of the debt, *cf. Newell* v. *Gregg* (N. Y. 1868) 51 Barb. 263, or only incidental thereto, *cf. Nat. Bank* v. *Kirby* (1871) 108 Mass. 497, but whether by the custom of merchants a transfer of commercial paper after maturity of an instalment of interest is an unusual and therefore a suspicious circumstance, see *Union Investment Co.* v. *Wells* (1908) 39 Can. Sup. Ct. 625, for this is the ground upon which a purchaser after maturity of the principal is affected with notice of antecedent equities. *Brown* v. *Davis* (1789) 3 D. & E. 80; *Fisher* v. *Leland* (Mass. 1849) 4 Cush. 456. It would seem, especially in view of the practice of marketing bonds with several overdue coupons attached, see *Railway Co.* v. *Sprague* (1880) 103 U. S. 756, that non-payment of interest is not notice to a purchaser of an intention on the part of the maker to repudiate the debt. *Cromwell* v. *County of Sac* (1877) 96 U. S. 51; *Morton* v. *N. O. & S. Ry.* (1885) 79 Ala. 590. Moreover, a holder's neglect to demand prompt payment of interest does not destroy his rights against his indorsers; *Howe* v. *Bradley* (1841) 19 Me. 31; the failure of the plaintiff's transferrer, therefore, to collect the interest could have created no suspicion in the plaintiff's mind, and he must be considered a holder in due course. The decision of the

principal case, which is thus in accord with principle as well as with the great weight of authority, Daniel, Neg. Instr., (5th ed.) § 787; *contra, First Nat. Bank* v. *Forsyth* (1897) 67 Minn. 257, is founded moreover in sound policy, as the contrary rule would greatly embarrass the free circulation of commercial securities.

NUISANCE—INJURY TO HEALTH—RIGHT OF ONE NOT OWNING PPOPERTY TO RECOVER.—An infant, residing with his parents, died as a result of the polluted air from a pond used by the defendant in the manufacture of iron. The child's father, as his personal representative, sought to recover in an action on the case for a nuisance. *Held,* the action would lie even though the infant had no estate in the premises affected by the nuisance. *Hosmer* v. *Republic Iron & Steel Co.* (Ala. 1913) 60 So. 801. See Notes, p. 433.

PARTNERSHIP—NOTICE OF DISSOLUTION.—After the dissolution of a firm, the liquidating partner made and delivered two notes to the plaintiff bank in renewal of outstanding firm obligations. Notice of dissolution was not published and the bank was not given actual notice. The evidence showed knowledge of the dissolution on the part of plaintiff's cashier and directors. *Held,* the notes were not binding on the partner who had not authorized them. *Union Nat. Bank* v. *Dean et al.* (N. Y. App. Div., 4th Dept., 1913) 139 N. Y. Supp. 835. See Notes, p. 423.

PATENTS—RIGHT TO FIX PRICE FOR RESALE.—The defendant, who bought goods from a patentee, agreeing not to sell them below a certain price, violated his agreement. The patentee then sought an injunction, claiming infringement. *Held,* the restriction was invalid, and the plaintiff could not recover. *Waltham Watch Co.* v. *Keene* (D. C., S. D. N. Y., 1913) 202 Fed. 225.

Since the Patent Act gives the patentee the exclusive right equally to make, to use and to vend the invention, U. S. Comp. Stat. (1901) §4884, the decision in the principal case might seem inconsitent with *Henry* v. *Dick Co.* (1912) 224 U. S. 1, where certain restrictions on the use of the patented article were sustained. The only privilege conferred by this statute, however, is the right to exclude others from the benefits of the patent. *Bloomer* v. *McQuewan* (1852) 14 How. 539, 549. The rights of the patentee to make, use or vend the article himself are derived from the general law, and the limitations upon the exercise of such rights should accordingly be determined by the rules of that law. 12 COLUMBIA LAW REVIEW 709 *et seq;* 25 Harv. L. Rev. 454. The court, therefore, merely applied the usual test of reasonableness to the restriction imposed by the patentee, and, it seems, was justified in reaching a result opposite to that reached in *Henry* v. *Dick Co. supra.* There the patentee sold his invention for cost and made his profit out of other articles, which he required to be used with it, while in the principal case there was a fair profit to be had from the original sale, and the additional advantage which he gained through the further limitation on the selling price would seem to have been obtained through an unreasonable restraint of trade. See *Adams* v. *Burke* (1873) 17 Wall. 453; 25 Harv. L. Rev. 643. This result seems to be strongly supported by the conclusion of the Supreme Court that the owner of a copyrighted article, *Bobbs-Merrill Co.* v.

Straus (1908) 210 U. S. 339, or of a commodity manufactured by a secret process, *Dr. Miles Med. Co.* v. *Park & Sons Co.* (1911) 220 U. S. 373, may not regulate the resale price so as to prevent competition. But see *N. J. Patent Co.* v. *Schaefer* (1906) 144 Fed. 437; *The Fair* v. *Dover Mfg. Co.* (1908) 166 Fed. 117; *Automatic Pencil Sharpener Co.* v. *Goldsmith Bros.* (1911) 190 Fed. 205.

PUBLIC SERVICE COMPANIES—FAILURE TO STOP CIPHER CABLEGRAM—DAMAGES.—The defendant, while transmitting a cipher cablegram for the plaintiff, undertook at the latter's request to withdraw it, but negligently failed to do so. *Held,* one judge dissenting, the plaintiff could recover only nominal damages. *Bertuch et al.* v. *U. S. & Hayti Tel. & Cable Co. et al.* (N. Y. Sup. Ct. 1913) 139 N. Y. Supp. 289.

A firm adherence to the rule that special damages for a breach of contract can only be recovered if within the contemplation of the parties when the contract was made, *Hadley* v. *Baxendale* (1854) 9 Ex. 341, has led most of our courts to limit to nominal damages the liability of the company for negligence in the transmission of a cipher or unintelligible message, *Primrose* v. *W. U. Tel Co.* (1893) 154 U. S. 1; *W. U. Tel. Co.* v. *Wilson* (1893) 32 Fla. 527, in the absence of actual notice to the operator of the nature of the business to which it relates. *Houston etc. Tex. R. T. Co.* v. *Davidson* (1897) 15 Tex. Civ. App. 334; see *Postal Tel. Co.* v. *Lathrop* (1890) 131 Ill. 575, 585. This rule is frequently misapplied through a failure properly to distinguish between direct and consequential losses. 3 Sedgwick, Damages, (9th ed.) § 892. A few courts, however, allow a recovery by dispensing with the necessity of detailed notice. *Daughtery* v. *Tel. Co.* (1883) 75 Ala. 168; *W. U. Tel. Co.* v. *Way* (1887) 83 Ala. 542; *W. U. Tel Co.* v. *Fatman* (1884) 73 Ga. 285. In any event, where the action sounds in tort, from a technical viewpoint the company should be liable for the proximate results of its negligence even if these were not contemplated when the contract was made. *Cowan* v. *W. U. Tel Co.* (1904) 122 Ia. 379. The contrary result has, however, almost everywhere been reached on the theory that the gist of the liability is the breach of contract. *Fererro* v. *W. U. Tel. Co.* (1896) 9 App. D. C. 455; *W. U. Tel. Co.* v. *Merritt* (1908) 55 Fla. 462; but see *W. U. Tel. Co.* v. *Snodgrass* (1901) 94 Tex. 284. In the principal case, however, when the company undertook to stop the message the original contract was cancelled, and it would seem that negligence in failing to withdraw the message thereafter constituted an independent tort for which compensatory damages should have been allowed. See *Wells* v. *Tel. Co.* (1909) 144 Ia. 605.

SALES—CONDITIONAL SALES—RECOVERY OF PAYMENT WHERE PROPERTY IS RETAKEN.—A New York statute provided that where a vendor in a conditional sale retakes the property for default he must sell publicly with notice to the vendee or be liable for the payments already made. A vendor in such a sale, in which the vendee waived his right to notice and stipulated that the payments should be applied as rent, retook the property but did not sell. The vendee sued to recover the payments made. *Held,* he could recover, not having waived the sale. *Plumiera* v. *Bricka* (N. Y. Sup. Ct. 1913) 140 N. Y. Supp. 171.

A vendor in a conditional sale where the vendee had waived the statutory sale retook the property but did not sell it. The plaintiff

sued for the payments. *Held,* he could not waive his statutory right. *Crowe* v. *Liquid Carbonic Co.* (N. Y. App. Div. 1912) 139 N. Y. Supp. 587.

Any statutory right may be waived, when not in the interest of the public, but the language employed must be explicit to accomplish this result; a stipulation, therefore, that no notice of sale will be required cannot be construed as a waiver of the statutory right to the sale. *Hurley* v. *Allman Gas & Mach. Co.* (N. Y. 1911) 144 App. Div. 300; but see *Adler* v. *Weis etc. Co.* (N. Y. 1910) 66 Misc. 20, aff'd (1910) 138 App. Div. 918. Furthermore, courts will look through contracts made to evade such statutes and will give the vendee the advantage of the act wherever the agreement is clearly one of conditional sale; *Speyer* v. *Baker* (1898) 59 Oh. St. 11; therefore payments made on such a basis cannot be taken as rent even though the contract specifically so provides; *Cowan* v. *Singer Mfg. Co.* (1893) 92 Tenn. 376; *contra, Woodman* v. *Needham Piano Co.* (N. Y. 1905) 47 Misc. 683; nor can such a stipulation be regarded as a waiver of the right of sale. As this legislation was enacted in accordance with public policy and for the benefit of the public, in order to relieve needy persons from the burden of their contracts, the vendee cannot dispense with observance of the provisions of the statute. *Desseau* v. *Holmes* (1905) 187 Mass. 486; see *Massilon etc. Co.* v. *Wilkes* (Tenn. 1904) 82 S. W. 316; *contra, Butler* v. *People's etc. Co.* (1910) 124 N. Y. Supp. 645. The distinction between household and other goods suggested by *Adler* v. *Weis etc. Co. supra* and *Montague* v. *Wanamaker* (N. Y. 1910) 67 Misc. 650 is discountenanced by the development of the conditional sales statutes which, culminating in Personal Property Law §65, have rejected the distinction.

SURETYSHIP—DEFENSE OF SURETY—UNENFORCIBILITY OF PRINCIPAL OBLIGATION.—The defendant was surety on a bond, conditioned upon the performance by the principals of a covenant to pay rent contained in a lease. The lease was not duly acknowledged, and was therefore voidable by an enactment analogous to the Statute of Frauds. *Held,* the surety was liable for the lessees' non-performance. *Backus* v. *Feeks et al.* (Wash. 1913) 129 Pac. 86. See Notes, p. 426.

SURETYSHIP—ESTOPPEL—RECITAL IN SURETY'S BOND.—The defendant's undertaking by which he purported to become surety, contained a recital of the contract for the sale of merchandise by the plaintiff to the principal. It appeared that the contract in fact was not entered into. *Held,* the defendant was estopped by the recital in his undertaking to deny the existence of the primary obligation. *Gottsegan Cigar Co.* v. *Levy* (Utah 1913) 130 Pac. 780.

It has been held that a recital of facts in a surety's bond is an admission of such a high order that, like an admission in a pleading, it cannot be controverted. 1 Brandt, Suretyship, (3rd ed.) §52; *Otto* v. *Jackson* (1864) 35 Ill. 349. The maxim *volenti non fit injuria* has also been applied to an obligor's recital. *Bradford* v. *Skillman* (La. 1827) 6 Martin N. S. 123; see *Red Wing Sewer Pipe Co.* v. *Donnelly* (1907) 102 Minn. 192. According to the more recent cases, however, the recital must, it seems, be tested by the elements of a true estoppel. *Town of Pt. Pleasant* v. *Greenlee* (1907) 63 W. Va. 207; *City of Paducah* v. *Cully* (Ky. 1872) 9 Bush 323; *cf. Parrish* v. *Rosebud Mining Co.* (1903) 140 Cal. 635. The creditor must have acted, there-

fore, upon the faith of the representation, Ewart, Estoppel, 140, and this he could not do when he had knowledge of the truth. In the principal case if the primary contract with the plaintiff existed, the latter must have known it and accordingly could not have relied on the surety's recital of its existence. See *Allen* v. *Hopkins* (1900) 62 Kan. 175. Moreover, in the absence of a primary obligation the contract of suretyship is ordinarily void. Childs, Suretyship, §129; 1 Brandt, Suretyship, (3rd ed.) §4. In such a case, it is submitted, the surety should not be estopped by the recital to show that there was no obligation to which his contract could attach. See *Blaney* v. *Rogers* (1899) 174 Mass. 277; *Tinsley* v. *Kirby* (1881) 17 S. C. 1; *Thomas* v. *Burrus* (1852) 23 Miss. 550.

SURETYSHIP—SUBROGATION—STATUTE OF LIMITATIONS.—A surety, who had been compelled to pay a judgment against his principal, sought by subrogation to enforce the same against land subsequently acquired by the debtor. An action at law on the implied promise of indemnity was barred by the Statute of Limitations. *Held,* the plaintiff could succeed in his action. *Smith* v. *Davis* (W. Va. 1912) 76 S. E. 670.

When a surety satisfies the principal obligation, not only does the law imply a promise by the primary debtor to indemnify him, see *Appleton* v. *Bascom* (1841) 44 Mass. 169, but equity allows him to be subrogated to all the rights and remedies enjoyed by the creditor in reference to the original debt. *American Bonding Co.* v. *Bank* (1903) 97 Md. 598; *Hill* v. *King* (1891) 48 Oh. St. 75. Some courts hold that the payment by the surety does not *per se* effect a subrogation, but merely gives him a right to demand it as incidental to the implied promise of indemnity. Accordingly, subrogation is denied when the Statute of Limitations has barred an action at law for reimbursement. *Joyce* v. *Joyce* (Ky. 1866) 1 Bush 474; *Junker* v. *Rush* (1891) 136 Ill. 179; *Rittenhouse* v. *Levering* (Pa. 1843) 6 Watts & S. 190. Subrogation, however, is by the sounder view separate and distinct from the legal right to indemnity, and not incidental thereto; *Waldrip* v. *Black* (1887) 74 Cal. 409; *Carpenter* v. *Minter* (1888) 72 Tex. 370; 6 Pomeroy, Eq. Jur., (3rd ed.) § 924; hence the statutory period of limitations applying to actions on implied promises should not defeat it. *Smith* v. *Swain* (S. C. 1854) 7 Rich. Eq. 112; *Neal* v. *Nash* (1872) 23 Oh. St. 483. The principal case also represents the preferable view in holding that the payment does not discharge the judgment. Although it does at law effect a technical extinguishment of the remedy to which the surety claims recourse, see *Hill* v. *King supra; Cromer* v. *Cromer* (Va. 1877) 29 Gratt. 280, equity should keep the judgment alive for his benefit. *Neal* v. *Nash supra; Townsend* v. *Whitney* (1878) 75 N. Y. 425.

TORTS—JOINT WRONGDOERS—RELEASE OF ONE NOT LIABLE.—One injured by reason of a defective sidewalk released the city, for a consideration, from all claim for damages. It later appeared that the injury was due not to the city's negligence, but to that of the property owner. *Held,* the latter was also discharged. *Casey* v. *Auburn Tel. Co.* (N. Y. App. Div. 1913) 139 N. Y. Supp. 579.

The rule that a release of one of several joint tort-feasors releases all is based upon the theory that all were liable on a single cause of action. 12 COLUMBIA LAW REVIEW 753. It would seem to follow, upon

principle, that when a release is given to one in fact not liable the cause of action against the actual wrongdoers remains untouched and enforceable. *M., K. & T. Ry. Co.* v. *McWherter* (1898) 59 Kan. 345; *Wardell* v. *McConnell* (1889) 25 Neb. 558; *Wagner* v. *Union Stockyards Co.* (1891) 41 Ill. App. 408. The majority rule, however, is contrary. In support of their conclusion, the courts have generally said, in rather arbitrary fashion, that having received one satisfaction the plaintiff is not entitled to a second, *Seither* v. *Philadelphia Traction Co.* (1889) 125 Pa. St. 397; *cf. Hubbard* v. *St. Louis & M. R. R. Co.* (1902) 173 Mo. 249; *Tompkins* v. *Clay St. Ry. Co.* (1884) 66 Cal. 163, or that he should not be permitted to deny the validity of a claim which he has asserted to his own advantage. *C., C., C. & St. L. Ry. Co.* v. *Hilligos* (1908) 171 Ind. 417; *cf. Leddy* v. *Barney* (1885) 139 Mass. 394. It is evident that the decisions largely depend upon the element of public policy which seems to be involved. A practical reason, it is submitted, for excluding the question of whether a cause of action existed against the releasee is to be found in the difficulty of determining the liability of one who is not a party to the suit and who no longer has a pecuniary interest in the outcome. It is essential, of course, that the release relied upon should have been given as such in compromise of an asserted claim. See *C., C., C. & St. L. Ry. Co.* v. *Hilligos supra; Sieber* v. *Amunsen* (1891) 78 Wis. 679; 12 COLUMBIA LAW REVIEW *ubi supra.*

UNFAIR COMPETITION—SIMILAR TRADE-NAMES—NON-COMPETITIVE ARTICLES.—The plaintiff was a dealer in a variety of dairy products, not including ice-cream. The defendants prepared to manufacture and sell ice-cream under a name similar to the plaintiff's. *Held,* the plaintiff could not enjoin the use of the name. *Borden Ice Cream Co.* v. *Borden's Condensed Milk Co.* (C. C. A., 7th Circ., 1912) 201 Fed. 510.

The jurisdiction of equity to enjoin the imitation of a trade name is frequently put upon two grounds: to prevent deception of the public and to protect the plaintiff's business. See *Munro* v. *Tousey* (1891) 129 N. Y. 38; Hopkins, Unfair Trade, 29; Nims, Unfair Comp., §§16-19. When it has become necessary, however, to fix definitely the basis of the jurisdiction, the courts have clearly recognized that the injury to the plaintiff is the sole ground for relief, the deception of purchasers being only a means of working the injury. *American Washboard Co.* v. *Saginaw Mfg. Co.* (1900) 103 Fed. 281; *Weener* v. *Brayton* (1890) 152 Mass. 101; but see *Vitascope Co.* v. *U. S. Phonograph Co.* (1897) 83 Fed. 30. If equity, however, even under this test, is to afford adequate protection, relief should not be confined, it seems, to the typical case where persons intending to trade with the plaintiff, and who would otherwise do so, are induced to deal with the rival, see *Weinstock, Lubin & Co.* v. *Marks* (1895) 109 Cal. 529, but should be granted in any case where the good will of the plaintiff's business is affected. See *Borthwick* v. *Evening Post* (1888) L. R. 37 Ch. D. 449. In the principal case, it is true, in the absence of proof that the defendant's ice-cream was to be of poor quality, it cannot be said that harm, rather than benefit, would accrue to the plaintiff; and yet it seems that the plaintiff should be protected in its desire to build up its own business reputation. This, it must be confessed, verges upon the yet indefinite right of privacy rather than upon any established principle within the law of unfair competition. That the right

is nevertheless substantial is shown by the cases which prevent the appropriation of a technical trade-mark for use upon a new article within the same class as the old, though the articles do not compete. See 26 Harv. L. Rev. 442, 444.

VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT BY CREDITOR—SALE OF REALTY AND PERSONALTY.—In consideration of a conveyance of real and personal property the grantee agreed to pay the debts of the grantor. A creditor of the latter sought to enforce the vendor's lien upon the realty for the amount of his indebtedness. *Held*, three judges dissenting, he was entitled to do so. *Zeiser* v. *Cohn* (1913) 207 N. Y. 407.

When the vendee of real estate agrees to pay the purchase price to a creditor of the vendor or to pay the latter's debts, the creditor is usually allowed to enforce the vendor's lien. *Lynn* v. *Bass* (1887) 84 Ala. 281; *Kilbourne* v. *Wiley* (1900) 124 Mich. 370; *Simily* v. *Adams* (1901) 88 Mo. App. 621. This seems unobjectionable on principles of equity, as there is no reason to restrict the lien to the vendor once it is established on the land. 3 Pomeroy, Eq. Jur., (3rd ed.) § 1254. But no lien at all exists when the claim of the vendor is contingent or unliquidated, as when the vendee agrees to perform services as consideration for the conveyance. 3 Pomeroy, Eq. Jur., (3rd ed.) § 1251; see 8 COLUMBIA LAW REVIEW 234. In the principal case, however, the amount of the creditor's claim was readily ascertainable, and may, therefore, be made the basis of a lien. *Koch* v. *Roth* (1894) 150 Ill. 212. A more difficult objection is that the conveyance was of both realty and personalty, for unless it may be discovered from the contract what portion of the whole purchase price was paid for the realty, *Koch* v. *Roth supra*, it is held that there is then no lien on the realty. *Stringfellow* v. *Ivie* (1882) 73 Ala. 209; *Peters* v. *Tunell* (1890) 43 Minn. 473; *McCandlish* v. *Keen* (Va. 1857) 13 Gratt. 615. It is submitted that this should be the rule only in those jurisdictions which base the lien on the intention of the parties; but where it is thought that the vendee's unconscientious retention of the land without payment of the purchase price gives rise to the lien, see *McWhorter* v. *Stewart* (N. Y. 1899) 39 App. Div. 212, there seems to be no reason to refuse it on the land, even though it can not be granted on the personalty. Since the reason for the vendor's lien is uncertain, its scope cannot be accurately defined and should be governed by the natural equities of each particular case. See *Barrett* v. *Lewis* (1885) 106 Ind. 120.

WILLS—CONSTRUCTION—"LAWFUL ISSUE"—STATUTE OF LEGITIMATION.—The testator devised a part of his estate to the plaintiffs in trust to pay the income to the father of the defendants during his life, and upon the father's death to convey the principal to his lawful issue. Under a statute passed after the testator's death the subsequent marriage of their parents legitimized the defendant children. *Held*, they could not take under the will. *Central Trust Co. of New York* v. *Skillin et al.* (N. Y. Sup. Ct. 1912) 138 N. Y. Supp. 884.

The accepted meaning of the phrase "lawful issue" seems to be the same as that of the terms "issue" or "heirs of the body," namely, that issue which is by law legitimate and capable of inheriting. *Brisbin* v. *Huntington* (1905) 128 Ia. 166; *cf. Flora* v. *Anderson* (1895) 67 Fed. 182; *McNicoll* v. *Ives* (1895) 3 Ohio N. P. 6; but

see *Black* v. *Cartmell* (Ky. 1849) 10 B. Mon. 188. The class of persons included in this description may, therefore, be enlarged by law, *McKamie* v. *Baskerville* (1888) 86 Tenn. 459, without affecting the meaning of the term. Since in a devise with a remainder to the surviving issue of the devisee the members of the class taking are ascertained at a date subsequent to the testator's death, he having contemplated the creation of members of the class by birth at any prior time, *Webber* v. *Jones* (1900) 54 Me. 429, it seems that the creation of members by a change in the legal requirements of legitimacy has been similarly contemplated, so that issue born or fully legitimized after the testator's death would be included under his designation "lawful issue." *Miller's Appeal* (1866) 52 Pa. St. 113; *cf. McGunnigle* v. *McKee* (1874) 77 Pa. St. 81; *Sleigh* v. *Strider* (Va. 1805) 5 Call 439; but see *Hicks* v. *Smith* (1894) 94 Ga. 809. That descendants born in lawful wedlock were alone embraced by the term "lawful issue" at the time of the testator's death would not signify that it was his intention that only those children should inherit at a later date, for such an intention would be expressed by limiting the devise to issue "lawfully begotten." *Appeal of Edwards* (1885) 108 Pa. St. 283; *McGunnigle* v. *McKee supra.* In holding that this was the testator's purpose, however, the principal case has the support of an earlier decision in its jurisdiction. *U. S. Trust Co.* v. *Maxwell* (N. Y. 1899) 26 Misc. 276.